Supreme Court, U.S.
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No. 01-1068

In The

Supreme Court of the United States

JAMES HENDERSON,

Petitioner,

v.

GENERAL AMERICAN LIFE INSURANCE COMPANY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT GENERAL AMERICAN LIFE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRYAN CAVE LLP

CHARLES A. NEWMAN
(Counsel of Record)
BRUCE C. OETTER
JOHN W. ROGERS
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, MO 63102
(314) 259-2000 (Phone)
(314) 259-2020 (Fax)

Attorneys for Respondent General American Life Insurance Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether this case is moot in light of the district court's judgment approving the settlement – which was not stayed – and the ensuing implementation of the settlement – which cannot now be undone.

2. Whether petitioner lacks standing to contest the approval of a class-action settlement when he has elected not to participate in the very provisions that he seeks to challenge.

3. Whether this Court should hold this case in light of *Devlin v. Scardelletti*, No. 01-417, considering the legal infirmities of the petitioner and the mootness of the petition.

CORPORATE DISCLOSURE STATEMENT

Respondent General American Life Insurance Company ("General American") is a wholly-owned subsidiary of GenAmerica Financial Corporation, which is a wholly-owned subsidiary of Metropolitan Life Insurance Company, Inc., which is a wholly-owned subsidiary of MetLife, Inc. MetLife, Inc. is publicly-traded on the New York Stock Exchange under the symbol "MET."

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STATEMENT OF JURISDICTION

Apart from petitioner's lack of standing for failure to intervene, there are two further bars to the grant of the petition. First, petitioner did not obtain a stay of the district court's judgment approving the settlement, and the settlement has been implemented. Thus, as a matter of law and business reality, the implementation of this $55 million settlement involving more than 251,000 class members cannot now be undone and, accordingly, the issues raised by the petition are moot. Second, petitioner lacks standing to challenge a portion of the settlement in which he has elected not to participate.

A. The Implementation of the Settlement Cannot Be Undone.

The parties agreed to, and the district court approved, a settlement providing approximately $55 million of relief for over 251,000 class members. Neither petitioner nor anyone else obtained a stay of that judgment. Since that time, the settlement has been substantially effectuated:

- On June 1, 2001, General American fully implemented the General Policy Relief ("GPR") component of the settlement and began to provide benefits worth approximately $34 million to the class members who elected GPR;
- To date, 384 class members have died since December 31, 2000 (the effective date of the settlement), and General American has paid death benefits of $177,820.64 for 72 of those class members. Efforts are currently

under way to pay death benefits of $854,634 for the other 312 deceased class members;

- On June 1, 2001, General American fully funded the Claims Evaluation Process ("CEP") component of the settlement with $21 million (plus interest);

- Class members who elected CEP have provided information concerning their claims to the Claim Evaluator, and General American has spent considerable time and expense providing documentation to the Claim Evaluator for these claims;

- The Claim Evaluator is in the process of evaluating the claims and has already incurred substantial fees and expenses; and

- Pursuant to the district court's post-judgment order, General American paid $12.1 million in attorneys' fees to class counsel on November 16, 2001.

It is too late for this settlement to be unwound. General American cannot now take back the GPR benefits it has already provided to class members. Nor can it recover the $21 million for the CEP or the $12.1 million in attorneys' fees it has already paid. The families and beneficiaries of those class members who have died – who are not themselves parties to this action – cannot be ordered to return the $177,820 in death benefits they have received.

The belated relief petitioner seeks would require a complete dismantling of the entire settlement. It is simply too late to unscramble those eggs. General American (and

the class) relied on the district court's judgment approving the settlement – which was not stayed – and cannot now be returned to the settlement negotiating table in the same position that it occupied before. *See Mills v. Green*, 159 U.S. 651 (1895). In *Thibaut v. Ourso*, 705 F.2d 118, 120-21 (5th Cir. 1983), the court summarized the applicable rule:

> "[I]n the absence of a stay, action of a character which cannot be reversed by the court of appeals may be taken in reliance on the lower court's decree. As a result, the court of appeals may become powerless to grant the relief requested by appellant. Under such circumstances, the appeal will be dismissed as moot."

See also In re Public Serv. Co., 963 F.2d 469 (1st Cir. 1992) *cert. denied sub nom. Rochman v. Northeast Utilities Serv. Co.*, 506 U.S. 908; *In re Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977). The prejudice to General American and the class by this "twelfth hour" petition without any prior stay or bond is extreme. This action is now moot and accordingly the petition should be denied.

B. Petitioner Did Not Opt for CEP Relief and Therefore Lacks Standing To Challenge any CEP Provisions of the Settlement.

Petitioner did not elect to participate in the CEP portion of the settlement (requiring submission and evaluation of individual claims) and has instead accepted the GPR relief (which is automatic and "no fault"). He thus has no standing to challenge any alleged unfairness or inadequacy of the CEP provisions of the settlement. Petitioner is in the same posture as one who opts out of a

settlement entirely and then attempts to appeal the approval of its terms. In that situation, one who opts out cannot be heard to argue that the settlement is unfair or inadequate – or that they would have joined the settlement if it had different terms. They simply have no standing to contest the settlement because it does not affect them. *See, e.g., In re Integra Realty Resources, Inc.*, 262 F.3d 1089, 1102 (11th Cir. 2001); *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 28-29 (D.C. Cir. 2000); *In re Brand Name Prescription Drugs Antitrust Litigation*, 115 F.3d 456, 457 (7th Cir. 1997). Petitioner's challenge to the fairness of the CEP that he has rejected is indistinguishable, and his petition should be denied.[1]

COUNTER-STATEMENT OF THE CASE

Respondent incorporates by reference the statement of facts in the opinion of the Eighth Circuit. Beyond that, it is only necessary to more fully describe the CEP provisions of the settlement to which petitioner objects and to correct certain points in petitioner's statement of the case related to the implementation and evaluation of the CEP.

[1] Respondent raised this argument below, but the Eighth Circuit in dismissing petitioner's appeal did not reach it. Consequently, petitioner's statement is incorrect that "[i]t is undisputed that if objectors need not be intervenors to have appellate 'standing' to appeal approval of a class action settlement, the Eighth Circuit would have reached the merits of petitioner's appeal rather than dismissing his appeal for lack of jurisdiction." Pet. at 2.

The CEP provides class members with a simple process to resolve promptly any complaints relating to the purchase of a General American life insurance policy and to obtain relief tailored to the nature and strength of their claims. The Claim Evaluator uses guidelines proposed by class counsel, agreed to by the parties and approved by the district court, and reviews claims and awards relief without any involvement by General American. The Claim Evaluator is class-member-friendly – a person hired by class counsel, paid by class counsel out of the CEP Fund, and whose activities are monitored and controlled by class counsel. The Claim Evaluator is not a neutral arbiter, but rather a person who is an advocate for class members and whose function is to distribute up to $21 million to them.

The sole provision of the Stipulation to which petitioner objects (Pet. at 5) states:

> **Level Zero Claims:** Claims shall be designated Level Zero Claims if they are contradicted by Documentation or if, in the discretion of the Claim Evaluator, the Claim otherwise deserves such designation, and they shall not be entitled to any relief.

The function of the Claim Evaluator is to ensure that the CEP Fund is appropriately distributed to deserving class members – not to persons who have no claim but nonetheless seek a windfall from the CEP. Granting the Claim Evaluator the ability to designate a claim at a Level Zero is necessary to protect the integrity of the CEP; otherwise, unscrupulous claimants could unfairly obtain a portion of the CEP Fund that should be available to more deserving class members. It also addresses the patently frivolous

claim (*i.e.*, one that is "contradicted by Documentation"). In addition, the settlement provides detailed guidance to the Claim Evaluator in categorizing and scoring claims, and the Claim Evaluator must follow it.

Petitioner ignores the fact that the language of which he complains is contained in the relevant criteria that the Claim Evaluator should consider in scoring all claims. That is, in designating a particular claim as Level Three, Level Two, or Level One, the Stipulation permits such a score if, "[i]n the discretion of the Claim Evaluator the Claim otherwise deserves such designation." Further, the discretion is not unfettered, but is guided by detailed criteria developed by class counsel designed to benefit class members.

Petitioner describes the CEP as a process in which General American "submits documents, presumably to contradict the claims of the class member." Pet. at 4. Petitioner's speculation is baseless: the CEP is not an adversarial process, and General American gets none of its $21 million back if a class member's claim is denied. If any class members who elected CEP score a zero on their claim, any additional CEP funds are available for distribution to other CEP claimants. If any of the $21 million remains in the CEP Fund after all relief is awarded to class members and the costs of CEP administration have been paid, such remaining funds "spill over" and are automatically distributed to class members not electing CEP, including petitioner, through the GPR. Hence, petitioner, not General American, possibly benefits from the designation of a specific claim as a Level Zero Claim.

Finally, petitioner contends that the decision of the Claim Evaluator is final and not subject to appeal. Pet. at 5. This provision of the CEP is for the benefit of class members, not General American. Based on their experience with an adversarial CEP, class counsel insisted on having the decision of the Claim Evaluator be final and not subject to appeal by any class member. This provision avoids the delay, cost, and inefficiencies of an adversarial claim evaluation process, which comes out of the funds that would otherwise be distributed to class members.

REASONS FOR DENYING THE PETITION

PETITIONER HAS WAIVED THE ARGUMENT PRESENTED BY *DEVLIN V. SCARDELLETTI*, NO. 01-417.

Petitioner asserts that his petition presents the same "standing" question this Court has agreed to hear in *Devlin v. Scardelletti*, 122 S.Ct. 663 (Dec. 10, 2001) (No. 01-417). Not so. Unlike *Devlin*, petitioner did not appeal the denial of his motion to intervene and never argued below that he had standing to appeal even if he was not allowed to intervene. Instead, petitioner (a) exclusively argued the merits of the settlement agreement in his Opening Brief; (b) asserted in his Reply Brief that he had appealed the denial of his motion to intervene – although the issue was never mentioned in his Opening Brief – because that order was part of the final judgment from which he had appealed; and (c) never once challenged the district court's denial of leave to intervene or argued that he would have standing to appeal even if he was not allowed to intervene. As correctly noted by the Eighth

Circuit: "Henderson neglects to identify the intervention question as an issue in his Statement of Issues, and he does not even mention the word 'intervenes' in his brief." (Pet. Apdx. 10). Therefore, wholly apart from the multiple and significant jurisdictional impediments to his petition, petitioner's attempted wholesale transformation of his position below, in order to piggyback on *Devlin*, should be rejected.

In *Scardelletti v. Debarr*, 265 F.3d 195, 198-99 (4th Cir. 2001), Devlin argued both that he was entitled to intervene below *and* that even if the district court properly denied his motion to intervene, he nevertheless had standing to appeal the approval of the settlement. Here, on the other hand, petitioner neither appealed the denial of his motion to intervene *nor* argued that he nevertheless had standing to appeal. Rather, the Eighth Circuit concluded that he never appealed the denial of his motion to intervene and thus dismissed his appeal. This case is thus fundamentally different than both *Devlin* and *United Automobile Workers v. Scofield*, 382 U.S. 205, 208-09 (1965), in which this Court held that a would-be, but unsuccessful, intervenor has standing to seek certiorari from the action of a court of appeals denying intervention.

More importantly, however, petitioner never argued that he would have standing to appeal – as an objecting class member – even if he was not allowed to intervene. It is well-settled that this Court does not ordinarily decide questions not raised or litigated in the lower courts. *See, e.g., City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987) (dismissing writ as improvidently granted for failure to raise issue in court of appeals). This case does not

present the question raised by *Devlin* and belatedly asserted by petitioner in this Court.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BRYAN CAVE LLP

CHARLES A. NEWMAN
(*Counsel of Record*)
BRUCE C. OETTER
JOHN W. ROGERS
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102-2750

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